(19,284.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 218.

LEE L. CLARK, ROBERT N. BENNETT, T. F. CARLISLE, LINCOLN CARLISLE, AND RICHARD CARLISLE, PLAINTIFFS IN ERROR,

vs.

E. J. NASH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a In the Supreme Court of the State of Utah.

E. J. NASH, Plaintiff and Respondent,
v.
LEE CLARK ET AL., Defendants and Appellants.

Appeal from fourth district, Utah county—Hon. J. E. Booth, judge.

Transcript on Appeal.

Filed Sep. 8th, 1902.

L. P. PALMER,
Clerk Supreme Court Utah,
By H. W. GRIFFITH, *Deputy.*

Warner, Houtz, Prentiss and Warner attorneys for respondent.
J. W. N. Whitecotton, attorney for appellants.

1 In the District Court of the Fourth Judicial District of the State of Utah in and for the County of Utah.

E. J. NASH, Plaintiff,
v.
LEE L. CLARK, ROBERT N. BENNETT, T. F. CARLISLE, Lincoln Carlisle, and Richard Carlisle, Defendants.
} Complaint.

Plaintiff above named, complains of the defendants and alleges:

1. That plaintiff is and during all the times mentioned herein was the owner of in the possession of and entitled to the possession of the south half of the northwest quarter of section 24, township 4 south range 1 east of Salt Lake meridian, in Utah county, State of Utah.

2. That Fort Canyon creek is a natural stream of water flowing from the mountains on the north of plaintiff's said land in a southerly direction to and near to plaintiff's said land aforesaid.

3. That said land of plaintiff above described, is arid land, and will not produce without artificial irrigation, but that with artificial irrigation the same will produce abundantly of grain, vegetables, fruit and hay.

4. That the defendant Robert N. Bennett is the owner of and in the possession of, and during all the times mentioned herein was the owner and in the possession of the northwest quarter of *of* the
2 southeast quarter, and the east one half of the southwest quarter of section 13, and the northeast quarter of the northwest quarter of section 24 in township 4, south of range 1, east of Salt Lake meridian in Utah county, State of Utah.

That the defendant Lee Clark, during all the times mentioned herein, was, and now is the owner of and in the possession of the north half of the northeast quarter, the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quar-

ter of section 13, in township 4 south of range 1, east of Salt Lake meridian, in Utah county State of Utah.

5. That all of said defendants have jointly constructed and jointly own and are maintaining a water ditch or canal which diverts the, or a portion of the waters of the said Fort Canyon creek, on the west side of said creek (being on the side of said creek where plaintiff's said land is situated) at a point about one and one-fourth mile northeasterly from plaintiff's said land, the source of which is near the center of the north half of the northeast quarter of section 13 of said township, running thence over and across the said land of the defendants in a southwesterly direction to and within about one hundred feet of the north center of plaintiff's said land; that said ditch or water canal of the defendants is the only ditch or canal constructed or owned by them diverting said waters of said creek on the lands above described, and is about one and one-fourth miles in length, and is more fully designated by the plat attached hereto and made a part of this complaint.

3 6. That plaintiff is the owner of and entitled to the use of sufficient of the flow of the waters of said Fort Canyon creek to irrigate and water his said land, and that there is no other or convenient or practicable way in which to divert the waters of said creek onto plaintiff's land, except by and through the ditch above described of the defendants.

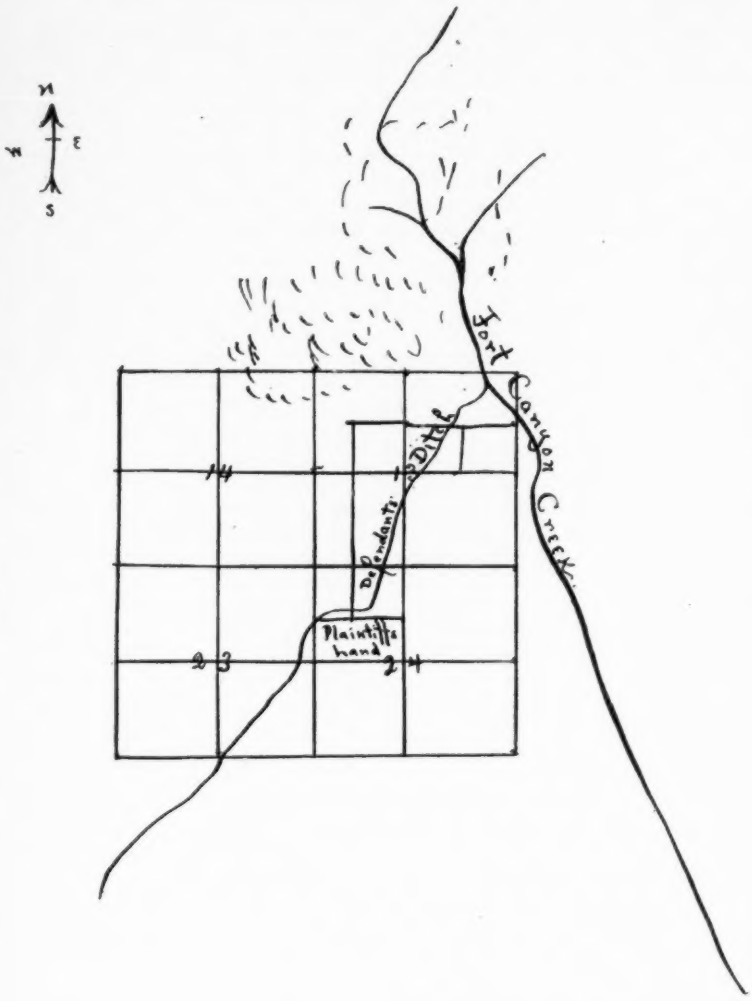
7. That it is necessary for plaintiff to enjoy the use and benefits of the use of said waters and to have a right of way through the said ditch of the defendants and over their said lands, in order to irrigate plaintiff's said land.

8. That the ditch of said defendants is a small ditch of about 18 inches wide and about 12 inches deep; that plaintiff contemplated the enlargement of said ditch and right of way for diverting his said waters of said Fort Canyon creek to his said land, and will not in any manner injure said ditch nor the rights of the defendants therein, except it will require about one foot more in width with a depth of about one foot.

9. That on the sixteenth day of January 1902, and prior to the commencement of this action, the plaintiff requested of and from the defendants the right to so enlarge said ditch, and for a right to use the same for diversion of and carrying of the waters of said Fort Canyon creek, belonging to plaintiff to his said land, so that the same might be used for the irrigation of his said land, and offered to pay any and all damages which the said enlargement of said ditch would cause, and offered to and now is willing to contribute his share of and proportion of the expense of maintaining said ditch when so enlarged, and is now willing to pay said damages and all and every damage incident to the enlargement thereof, and for such right of way; and the defendants then and there and ever

4 since have refused to permit plaintiff to enlarge said ditch or to use the same in any manner or at all.

10. That plaintiff has attached hereto a plat showing the location



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v.
Nash.

Pl. 4. S.R.I.E.
Salt Lake Meridian
Utah County, State of Utah.

of the general route of, the source and termini of said ditch, with respect to its location with plaintiff's said land.

11. That if plaintiff is permitted by decree of this court to use the same that his land can be made productive as aforesaid, and the use of said waters, to which plaintiff is entitled, can and will be put to a beneficial and public use, in the irrigation of plaintiff's said land, and for no other purpose.

12. That plaintiff is informed and believes that upon complying with the offer made by him to the said defendants as above stated, that he has a right to so enlarge the said ditch of the said defendants, and to have a right of way in said ditch when so enlarged to the extent of its enlarged capacity, to divert and carry the waters from said creek to which plaintiff is entitled to the use of, down to and on his said land for the purpose of irrigating the same.

Wherefore plaintiff prays that he be permitted to enlarge said ditch of the defendants to the extent of widening said ditch one foot more to-wit: to a width of 28 inches, and to a depth now equal to the depth of said ditch; that he have a perpetual right of way through said ditch when so widended and constructed for the purpose of diverting and carrying his said waters to his said land for irrigation purposes. That the damages for said right of way and use of said ditch by plaintiff be fixed and determined, and that upon the payment by plaintiff of such damages, that plaintiff have his rights in and to the use of said ditch condemned for the purposes above set forth, and that defendants be enjoined from *from* in any manner asserting any right antagonistic to this right of plaintiff.

That plaintiff have such other and further relief in the premises as shall be just and equitable, and recover his costs herein.

WARNER, HOUTZ, PRENTISS & WARNER,
Attorneys for Plaintiff.

STATE OF UTAH, }
County of Utah, } *ss:*

M. M. Warner being first duly sworn upon his oath says that he is one of counsel for the plaintiff; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein alleged upon information and belief, and as to such matters he believes it to be true. That the reason that this affidavit is made by counsel and not by the plaintiff is that the plaintiff is absent from the county where affiant resides, and from this county.

[SEAL.] M. M. WARNER.

Subscribed and sworn to before me this the 29th day of July 1902
JOSEPH F. FARRER,
Notary Public.

(Here follows diagram marked p. 5½.)

6 It is hereby stipulated and agreed by and between the parties hereto and by and between their respective counsel, that the attached and foregoing complaint and plat, may be substituted and filed in place of the original complaint in this action, and be considered as having been filed in the first instance in this case, and that the demurrer filed by the defendants in this case be considered as filed to this complaint, and that this complaint stand in the same place and in lieu of the original complaint filed herein.

Dated this the 29th day of July 1902.

WARNER, HOUTZ, PRENTISS & WARNER,
Attorneys for the Plaintiff.

J. W. N. WHITECOTTON,
Attorney for the Defendants.

7 In the District Court of the Fourth Judicial District of the State of Utah in and for the County of Utah.

E. J. NASH, Plaintiff,
v.
LEE CLARK, ROBERT BENNETT. T. F. CARLISLE, Lincoln Carlisle, and Richard Carlisle, Defendants. } Demurrer.

Come now the defendants in the above entitled cause and demur to plaintiff's complaint herein, and for cause of demurrer say: Said complaint does not state facts sufficient to constitute a cause of action against the defendants.

J. W. N. WHITECOTTON,
Attorney for Defendants.

Received a copy of the above demurrer this 27th day of June, 1902.

WARNER, HOUTZ, P. — W.

8 In the District Coirt of the Fourth Judicial District of the State of Utah in and for the County of Utah.

E. J. NASH, Plaintiff,
v.
LEE CLARK, ROBERT BENNETT, T. F. CARLISLE, Lincoln Carlisle, and Richard Carlisle, Defendants. } Waiver of Answer.

In this cause the court having heretofore overruled the demurrer of the defendants to the complaint of the plaintiff, the defendants hereby waive the statutory and all time in which to answer the complaint, and hereby elect to stand on the said demurrer.

Dated this the 14th day of July, 1902.

J. W. N. WHITECOTTON,
Attorney for Defendants.

9 In the District Court of the Fourth Judicial District of the State of Utah in and for Utah County.

E. J. NASH, Plaintiff,
v.
LEE CLARK, ROBERT BENNETT, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, Defendants.

Findings of Fact and Conclusions of Law.

This cause coming on to be heard regularly for trial the plaintiff appearing in person and by Warner, Houtz Prentiss & Warner, his attorneys and counselors, and no one appearing on behalf of the defendants, and it appearing from the files and records of this cause that the defendants *was* and each of them *were* duly and legally served with summons herein, and that they and each of them appeared in said case, and filed a demurrer to the complaint of the plaintiff, and the said demurrer having heretofore been overruled by the court, and the said defendants and each of them having thereafter on the 18th day of July filed their written waiver of the statutory and all time to answer the complaint of the plaintiff, and their election to stand on the demurrer filed as aforesaid, and the plaintiff having duly caused a default to be entered against said defendants and each of them for failure to answer said complaint, and the court having this day heard the evidence on the part of the plaintiff, which said evidence was free from all legal objections and exceptions as to its competency, relevancy, materiality and sufficiency,
10 and being fully advised in the premises as to the facts, finds therefrom the following:

Findings of Fact.

That the plaintiff during all the times mentioned in said complaint, to-wit, from the first day of January, 1902, down to the present time inclusive, was has been and now is the owner of, in possession of and entitled to the possession of the south half of the northwest quarter of section 24, in township 4 south of range 1, east of Salt Lake meridian, in Utah county, State of Utah.

That Fort Canyon creek is a natural stream of water flowing from the mountains on the north of plaintiff's said land, in a southerly direction to and near to plaintiff's said land.

That said land of plaintiff above described is arid land and will not produce without artificial irrigation, but that with artificial irrigation the same will produce abundantly of grain, vegetables, fruits and hay.

That the said defendants own land, lying north of and adjacent to plaintiff's said land, and said defendants have constructed and are maintaining and jointly own a water ditch which diverts a portion

of the said waters of the said Fort Canyon creek, on the west side of said creek (being the side on which plaintiff's said land is situated) at a point about one mile north of plaintiff's said land in section 13 of said township, down to a point within a hundred feet of plaintiff's said land, which said ditch is begun on the defendants' land and runs in a southerly direction over said defendants' land and onto and over the lands of the said defendants to said point about a hundred feet of plaintiff's said land.

That plaintiff is the owner of and entitled to the use of sufficient of the remainder of the flow of the waters of the said Fort
11 Canyon creek to irrigate his said land, and that the irrigation of said land by the waters of said creek and the uses of the said waters in the irrigation of the said lands of the defendant is under the laws of this State declared to be, and the same is a public use.

That the said waters of said Fort Canyon creek cannot be brought upon the said plaintiff's said land by any other route except by and through the ditch of the defendants, owing to the canyon through which said ditch runs being such as to only be possible to build one ditch.

That plaintiff has no other way of irrigating his said land except by the use of the waters of said Fort Canyon creek and that unless plaintiff is allowed to enlarge the ditch of the defendants and have a right of way through said ditch for the flow of the waters of said Fort Canyon creek down to plaintiff's said land, that said land of plaintiff will be valueless and the waters of said Fort Canyon creek will not be available for any useful purpose.

That said ditch of defendants is a small ditch about 18 inches wide and about 12 inches deep; that if the plaintiff is permitted to widen said ditch one foot more it will be sufficient in dimensions to carry plaintiff's said water to which he is entitled to his said land and the same can and will be put to a beneficial and public use, in the irrigation of the soil on plaintiff's said land hereinbefore described.

That on the 16th day of January, 1902, and while the said defendants were not in the actual use of their said ditch, and while the widening of said ditch at said time would not in any manner interfere with said defendants, other than the act of widening of same, the plaintiff requested of the said defendants the right to so widen the said ditch of the said defendants so as to make it one foot wider, for the purpose of using the same to carry the water of the plaintiff on to his said land from said creek, and at said time
12 and place offered to pay to said defendants all damages which the said defendants might suffer by reason of said enlargement, and offered to pay his proportion of the maintenance of keeping the same in repair, and asked of said defendants a right to continue the use of said ditch in common with said defendants and to use the same so as not to interfere with the use of said ditch by said defendants, and it further appearing to the court that the said plain-

tiff is now and has ever since been willing to pay said damage and all damage incident thereto—and to pay his just proportion of the cost of maintaining said ditch. That the said defendants then and there and ever since have refused to permit plaintiff to enlarge said ditch or to use the same, or in any manner to interfere with the same.

And it further appearing to the court that the said defendants would suffer damages by reason of the enlarging of said ditch one foot in width, in the sum of $40.00, and no more. And that the said plaintiff has deposited with the clerk of this court to be paid to the order of the said defendants the sum of $40.00, in full payment of such damages. That the land of the defendants not sought to be condemned by plaintiff would suffer no injury or damage.

And it further appearing from said evidence that said ditch of the defendants can be widened by the plaintiff one foot more without injury to defendants or to said ditch, and that said widening of said ditch and the use thereof by the plaintiff will not in any manner interfere with the free and full use thereof by the defendants for the carrying of all the waters of the said defendants. Now, as applicable to the foregoing facts, the court now finds the following:

Conclusions of Law.

13 The court finds and decides that the plaintiff is entitled to a decree of this court condemning a right of way through defendants' said ditch, to the extent of widening said ditch one foot more than its present width and to a depth of said ditch as now constructed through the entire length thereof down to plaintiff's said land, for the purpose of carrying his said waters of said Fort Canyon creek to the land of the plaintiff for the purpose of irrigation, and is entitled to an easement therein to the extent of the enlarging of said ditch and for the purposes aforesaid and to have a perpetual right of way to flow waters therein to the extent of the said enlargement.

That the defendants are entitled to have and recover from the said plaintiff the sum of $40.00 damages for injury sustained by reason of the enlargement and improvement above stated and such right of way and easement.

That the plaintiff is required to contribute to the cost and expense of maintaining and keeping the said ditch in repair in an amount and proportion bearing the same relation to the whole amount of cost and expense as the waters he flows therein bears to the whole amount flowed therein both by the plaintiff and defendants.

That the plaintiff recover no costs herein and judgment is hereby ordered to be entered accordingly.

Done at Provo City, county and State of Utah, this the — day of July A. D. 1902.

J. E. BOOTH, *Judge.*

14 In the District Court of the Fourth Judicial District of the State of Utah in and for Utah County.

E. J. NASH, Plaintiff,
v.
LEE CLARK, ROBERT BENNETT, T. F. CARLISLE, Lincoln Carlisle, and Richard Carlisle, Defendants. } Decree of Court.

This cause coming on regularly to be heard this — day of July, 1902, upon the complaint of the plaintiff, being taken as confessed by the defendants, whose default for not answering has been duly entered, and the court having heard the testimony and proofs of the plaintiff and considered the same and the records and files herein and made its written findings of fact now on file and its conclusions of law also on file herein, from which it appears that the plaintiff is entitled to the relief prayed for in his complaint, and it further appearing that the use for which plaintiff seeks to condemn the property described in his complaint and for which he asks a decree of condemnation, is necessary for the plaintiff's use and that such use is a public use as found in the findings of fact herein, now,

On motion of Warner, Houtz, Prentiss & Warner, for the plaintiff, it is ordered, adjudged and decreed, that the property hereinafter described, be, and the same is hereby condemned for the use
14½ of the plaintiff to flow water therein for irrigation purposes and he (plaintiff) is hereby adjudged and decreed to have a perpetual easement therein to the extent of his enlargement of the canal and ditch of plaintiff hereinafter described, for the purposes aforesaid, and it is decreed and determined that plaintiff have the right to enter upon said land for the purposes of enlarging said canal and ditch upon the payment of the damages hereinafter assessed and decreed to the defendants.

The property and premises herein condemned is described as follows, to-wit: A certain ditch owned by the defendants intersecting Fort Canyon creek in Utah county, State of Utah, at a point near the center of the north half of the N. W. ¼ of section 13, in township 4 S. of range 1, east of Salt Lake meridian, and running from that point in a southwesterly direction over the lands of the defendants to the north boundary of plaintiff's said land to-wit: to the south half of the northwest quarter of section 24 in township 4, south of range 1 east of Salt Lake meridian, being the only ditch diverting water from the said Fort Canyon creek on the west side thereof in said sections. That said condemnation goes only to the extent of permitting the plaintiff to enter on said premises and at his own cost and expense to enlarge said ditch to one foot wider than it is now and to the present depth of said ditch, and a perpetual easement therein for the carrying of and flowing of the waters of said Fort Canyon creek through said ditch when so enlarged to his said

land to the extent of the enlarged capacity of said ditch for irrigation purposes. Also the right to enter on said lands along the line of said ditch for the purpose of keeping the same in repair for such purposes.

It is further ordered and decreed that the plaintiff shall pay the necessary costs and expense of measuring and dividing the
15 waters of the plaintiff from the waters of the defendants flowing in said ditch.

It is further ordered and decreed that the plaintiff shall contribute to the cost and expense of maintaining and repairing of said ditch the sum and amount of money in proportion to the whole cost o such maintenance as the amount of water he flows therein bears to the whole amount flowed therein by both plaintiff and defendants.

It is further ordered that the plaintiff pay to the clerk of this court for the use and benefit of the defendants the sum of $40.00 being the amount of damages which the defendants will sustain by reason of the condemnation of said premises herein.

It is further ordered and decreed that the said defendants will by reason of the condemnation of said premises be damaged to the extent of this decree suffer damage in the sum of $40.00 and no more, and that the defendants' lands and premises not sought to be condemned herein will not suffer any damage or injury whatever.

It is further ordered and decreed that the plaintiff shall not enter upon said premises for the purpose of enlarging said canal or ditch at any other time than between the first day of October and the first day of March, unless the parties hereto agree upon some other date.

It is further ordered and decreed that the rights herein conferred upon the plaintiff and the privileges herein enumerated shall be used by the said plaintiff in such manner as to not unnecessarily impair the use of the said premises by the defendants as such owners thereof.

It is further ordered and decreed that the plaintiff recover his costs herein against the defendants, to be hereafter taxed.

16 It is ordered, adjudged, and decreed that upon the payment by the plaintiff to the clerk of this court, for the use and benefit of the defendants the sum of $40.00 damages above found, that this decree shall immediately be of force and effect.

Done at Provo City, county and State of Utah, this the 29th day of July 1902.

J. E. BOOTH, *Judge.*

17 In the District Court of the Fourth Judicial District of the State of Utah, County of Utah.

E. J. NASH, Plaintiff,
v.
LEE CLARK ET AL., Defendants. } Judgment Roll Certificate.

I, the undersigned, clerk, of the district court of the fourth judicial district of the State of Utah, in and for Utah county, do hereby certify the foregoing to be the original judgment entered in the above entitled action; and I further certify that the foregoing papers, hereto annexed, constitute the judgment roll in said action.

Witness my hand and seal of said court, this 14th day of August, 1902.

F. BACHMAN, *Clerk*,
By PAULINE MOORE,
Deputy Clerk.

[SEAL.]

17½ In the District Court of the Fourth Judicial District of the State of Utah in and for the County of Utah.

E. J. NASH, Plaintiff,
v.
LEE L. CLARK, ROBERT N. BENNET, T. F. CARLISLE, Lincoln Carlisle, and Richard Carlisle, Defendants. } Notice of Appeal.

To the above named plaintiff, and to Warner, Houtz, Prentiss and Warner, his attorneys, and to the clerk of the fourth judicial district court for Utah county, State of Utah:

Please take notice that the defendants in the above entitled cause hereby appeal — the supreme court of this State from the judgment in such case made and entered by the said fourth judicial district court on the 29th day of July, 1902.

Dated this 14th day of August, 1902.

J. W. N. WHITECOTTON,
Attorney for Defendants.

Due service of the foregoing notice by receipt of a true copy thereof is hereby admitted this 14th day of August. 1902.

WARNER, HOUTZ, PRENTISS AND WARNER,
Attorneys for Plaintiff.

18 In the District Court of the Fourth Judicial District of the State of Utah in and for the County of Utah.

E. J. NASH, Plaintiff,
v.
LEE L. CLARK, ROBERT N. BENNETT, T. F. CARLISLE, LINCOLN Carlisle, and Richard Carlisle, Defendants.

I, F. Bachman, clerk of the fourth judicial district court in and for Utah county, State of Utah, do hereby certify that the foregoing are the original substituted complaint, the original demurrer, the original waiver of time to answer, the original findings of fact, conclusions of law and decree, and the original notice of appeal in the above entitled cause, and that they constitute the transcript on appeal and are transmitted to the supreme court of the State of Utah pursuant to such appeal. I further certify that a stipulation in writing of the parties waiving an undertaking on appeal has been properly filed in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal at Provo City, Utah, this 14th day of August, A. D. 1902.

[SEAL.] F. BACHMAN, *Clerk*,
By PAULINE MOORE, *Deputy*.

19 In the Supreme Court of the State of Utah.

E. J. NASH, Plaintiff and Respondent,
v.
LEE L. CLARK, ROBERT N. BENNETT, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, Defendants and Appellants. } Petition in Error.

The above named appellants, by this their petition in error, respectfully present to the court:

1. That on the 20th day of June, 1902, the plaintiff filed his complaint in this action in the district court of the fourth judicial district of the State of Utah, in and for the county of Utah; that on the 27th day of June, 1902, the defendants filed their general demurrer to said complaint; that the court having heard arguments of counsel for both parties upon said demurrer, overruled it; on the 18th day of July, 1902, the defendants filed their waiver of time to answer the plaintiff's complaint, and their election to stand upon their said demurrer; that the court afterwards heard proof on behalf of the plaintiff, and on the 29th day of July, 1902, made its findings of fact, conclusions of law and judgment in said cause, and caused them to be filed all of which is fully set out in the record herein.

2. The court erred in overruling the defendants' demurrer to plaintiff's complaint in this cause for the following reasons, to-wit:

The complaint shows that the plaintiff owns alone 80 acres
20 of land which without irrigation is barren, but with irrigation will be productive; that the plaintiff owns certain water rights in Fort Canyon creek; that the defendants own in severalty two quarter sections of land lying north of the plaintiff's land and also a ditch, constructed by them and across their said land, which they use for irrigation of their land; that it will not injure the defendants to permit the plaintiff to enter upon their land and enlarge their ditch by making it one foot wider than it now is, and permitting the plaintiff to use it in common with the defendants for conducting his water, which he says is necessary for him; that the defendants refuse to allow him to so use their ditch or land.

Upon this state of facts, he asks that the court adjudge him to be entitled to use the ditch of the defendants and to enter upon their land for the purpose of enlarging the ditch, and that he have a perpetual right of way through said ditch and upon said land condemned to his use, and that the defendants be enjoined from asserting any right antagonistic to him.

This complaint seeks to have private property taken without the owners' consent and given to a private person for a merely private purpose, without any pretence of a public use. To do this is to deprive the defendants of their property without due process of law and is in violation of the seventh section of article one of the constitution of the State of Utah which provides as follows: "No person shall be deprived of life, liberty or property without due process of law," and of section twenty-two of article one which provides: "Private property shall not be taken or damaged for public use without just compensation." It would also be in violation of section
21 one of article XIV of amendments to the Constitution of the United States, which provides as follows: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

3. The court erred in rendering judgment in this case in favor of the plaintiff and against the defendants, because,

(*a.*) The effect of the judgment is to take the private property of the defendant- and transfer it to the plaintiff without the defendants' consent, for a merely private use, in violation of section seven of article one of the constitution of the State of Utah, which reads as follows: "No person shall be deprived of life, liberty or property, without due process of law," and of section twenty-two of article one, which reads as follows: "Private property shall not be taken or damaged for public — without just compensation."

(*b.*) The effect of the judgment of the trial court in this case is to compel the defendants, against their will, to transfer an estate in part of the lands and ditch which they own and hold, as their private property, to a private individual for his own and exclusive and private benefit, without any reference to a public use.

The said judgment is, therefore, in essence and effect, a taking of private property of the defendants and appellants without their consent, for the private use of the plaintiff and respondent, and is not due process of law, and is a violation of section one of article XIV. of the amendments to the Constitution of the United States, which provides: "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law."

4. The judgment of the court in this case is erroneous, because, if otherwise valid, it does not assess the value of each parcel of land condemned, or the damage thereto, as required and provided by section 3598, subdivision 1 of the Revised Statutes of Utah,
22 1898, it appearing from paragraph four of the complaint that the defendants Lee L. Clark and Robert N. Bennett each own 160 acres of land, across which the ditch in question runs, and that they own such land in severalty.

5. The judgment of the court in this cause is erroneous and void, because it does not describe, nor specifically designate or point out the property taken from the defendants by the court and given to the plaintiff.

It is respectfully submitted, that, for the reasons above set forth, the judgment of the district court ought to be reversed.

J. W. N. WHITECOTTON,
Attorney for Defendants and Appellants.

23 In the Supreme Court of the State of Utah, Regular February Term.

MARCH 16, 1903.

E. J. NASH, Respondent,
v.
LEE CLARK ET AL., Appellants. } Submission.

This cause coming on regularly to be heard was argued by Mr. J. W. N. Whitecotton in behalf of the appellants; by Mr. M. M. Warner, in reply, was submitted, and by the court taken under advisement.

Judgment.

Title of Court and Cause.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby affirmed.

Costs of the appeal to be taxed against appellants,

24 In the Supreme Court of the State of Utah.

E. J. NASH, Respondent,
v.
LEE CLARK ET AL., Appellants.

Plaintiff brought this action to condemn a right of way in a ditch owned by the defendants. The provisions of the statute upon which he bases his right of action so far as material to this case are, as follows: Sec. 3588 in part provides: "Subject to the provisions of this chapter the right of eminent domain may be exercised in behalf of the following public uses: * * *

5. Reservoirs, dams, water gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.

6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores, or from mines; mill dams; * * * also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places
25 for the reduction of ores, or any place for the flow, deposit, or conduct of tailings or refuse matter. * * *

10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat."

Sec. 1277, R. S. is, as follows: "Any person or corporation shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels or other means of securing, storing, and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use."

Sec. 1278 provides: "When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through which a new

canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; *Provided*, That said enlargement is to be done at
26 any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

The complaint herein, in substance alleges that plaintiff is the owner of eighty acres of land situated in Utah county, this State, which land without irrigation is arid, barren and unproductive, but with irrigation would produce in abundance hay, grain and other agricultural crops; that Fort Canyon creek is a natural stream of water in Utah county flowing from the mountains north of plaintiff's land in a southerly direction to and near plaintiff's land; that the defendants own a tract of land contiguous to and adjoining plaintiff's land on the north, and are also the owners of a certain ditch leading from Fort Canyon creek over and across their land to a point within 100 feet of plaintiff's land, which ditch is a mile and a quarter in length eighteen inches wide and twelve inches deep; that plaintiff owns water in Fort Canyon creek sufficient to irrigate his land above mentioned; that there is no other convenient or practicable way in which to divert the waters of said creek and convey the same on to plaintiff's land except by and through the ditch of defendants; that in order to irrigate his land it is necessary that plaintiff have a right of way through defendants' ditch; that for plaintiff to enter upon defendants' land to enlarge their ditch will not injure them; that plaintiff requested of defendants that they allow him to go onto their land and enlarge their ditch and use it for conducting his water to and on his land, and offered to contribute his share of the expense of maintaining the ditch and all damages; that the defendants refused to permit him to do so. Plaintiff asks that he be permitted to enlarge defendants' ditch to the extent of widening it one foot more; that he have a perpetual right of way through said ditch when so widened and constructed for the purpose of diverting and carrying his water from Fort Canyon creek to his land for irrigation purposes;
27 that the damages for such right of way and use of the ditch by plaintiff be fixed and determined, and that upon payment by the plaintiff of such damages he have such ditch condemned to the extent of and to the use and for the purposes above set forth, and that defendants be enjoined from in any way or manner asserting any right antagonistic to this right of plaintiff; that if plaintiff is permitted by decree of this court to enlarge and use the ditch as aforesaid, his land can be made productive and the use of the water to which plaintiff is entitled, can and will be put to a beneficial and public use in the irrigation of plaintiff's said land and for no other purpose.

Defendants interposed a general demurrer to plaintiff's complaint

alleging that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants elected to stand upon their demurrer, and the plaintiff introduced evidence in support of the allegations of his complaint, and the court entered judgment and decree in favor of plaintiff, condemning defendants' land as prayed for in the complaint; and for a reversal of this judgment the defendants have appealed to this court.

McCARTY, J., after a statement of the foregoing facts delivered the opinion of the court.

Appellants contend that the order of the district court overruling the demurrer, was erroneous, for the reason that the complaint on its face shows that the use to be made of the property sought to be condemned is strictly private, and in no sense a public use.

Both the Constitution of the United States and the constitution of this State provide that "private property shall not be taken or damaged for public use without just compensation." This
28 provision is construed to mean that private property cannot be taken for strictly a private use, which counsel for respondent concede to be the true and proper construction. This brings us to the only question presented by this appeal, to-wit: Was the condemnation of appellants' land in this case in law and in fact for a public use? There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempt to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, hold that by public use is meant a use by the public, or its agencies, that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions hold that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the Commonwealth. After a careful examination of the leading cases on this subject we are of the opinion that the class of decisions last mentioned are more in harmony with enlightened public policy and the liberal interpretation given the term public use, which the legislature has, in effect, declared shall be followed in this State, is far more conducive to individual and public advancement, than the restricted construction adopted and followed by the line of decisions first referred to.

The question of the manner of appropriation and use of water for domestic, irrigation, mining and manufacturing purposes is, and ever since the advent of the early pioneers, has been the most im-
portant and vital of all industrial questions with which the
29 people within this arid region have been confronted. Their requirements, and we might add, their absolute necessities, impelled the legislatures and courts at an early date in the history

of the States and Territories strictly arid in character, to depart from and lay aside as impracticable, some legal doctrines and rules relating to the control and use of water which had theretofore been adhered to and followed for ages, and to adopt and put in operation a new system of acquiring title in and to the streams which are within the arid belt, the use of which was found to be indispensable in agricultural pursuits, in mining, in the establishment of industries, and in the general development of the arid States and Territories.

By an examination of the records of the early cases in this State (then Territory) wherein the courts declined to follow and be governed by the common law doctrine of riparian rights, in its entirety, the same arguments were advanced by those claiming title to water under and by virtue of this doctrine, as are advanced by appellants in this case, to-wit: That fundamental rights were being interfered with, and the property of one citizen was taken and given to another. We very much doubt whether either advocate or laymen, who has witnessed the magnificent results wrought by the change, would now contend that the Constitution was overridden, or any natural or legal right of the citizens invaded and their property confiscated, when the common law doctrine of riparian rights was modified for the purposes of irrigation and mining, and a system for appropriating and acquiring title to water adopted that made it possible for populous and flourishing Commonwealths to grow up where the country otherwise would have remained a desert uninhabited, with the possible exception perhaps of an occasional cattle or sheep ranch. The question of how to increase the water supply in the arid region has steadily grown in magnitude and importance until it has become national as well as local. Congress realizing the great public necessity for an increased water supply, and appreciating the great possibilities that may be accomplished in this and other States and Territories within the arid belt by conserving and storing the high and surplus waters caused by the melting snows which in the spring months come down from the mountains in torrents, and are either wasted in the deserts or find their way into box canyons where they can never be made available for irrigation or other useful purposes, by a provision in the enabling act, (sec. 12) granted to this State five hundred thousand acres of the public lands, lying within the State, with which to create a fund to be used for the purpose of building reservoirs, and later on, by an act known as the irrigation bill, created a fund from the public revenues, which is swelling into the millions of dollars for the purpose of aiding in this most important of all enterprises of a public character in the arid West, and upon the success of which its future growth and prosperity largely depends. The large expenditure of public funds in this direction is not to be made for the purpose of enabling the States and Territories directly benefitted thereby, in their sovereign capacity to engage in farming and other lines of industry, which are dependant upon the water supply, but to ulti-

mately enable the citizens, as individuals, to provide themselves with homes, and to furnish additional opportunities for the further development of the great natural resources with which the arid region abounds. These questions which are the most important with which the Pacific States and Territories have had to deal, and the successive steps that have been taken in advancing our system of irrigation, are referred to for the purpose of showing the interest that the public have always had and must of necessity continue to have in the question of irrigation. The natural physical conditions of this State
31 are such that in the great majority of cases the only possible way the farmer can supply his land with water is by conveying it by means of ditches across his neighbor's lands which intervene between his own and the source from which he obtains his supply. The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary, to enable him to convey water to his farm, but that of the miner, manufacturer and persons engaged in other industrial pursuits, to build canals, flumes, and lay pipe lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. The future growth, prosperity, upbuilding and industrial expansion of the State not only depend upon the storing and holding back the high and surplus water so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available, and it is entirely within the province of the legislature to enact such laws respecting the appropriation and distribution thereof as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained. Experience has shown that the greater the amount of water flowing in a ditch of a given size and grade, the less the percentage of seepage and evaporation. Therefore, as a general rule, the owners of canals and ditches instead of being damaged by their enlargement and the turning therein of an additional quantity of water, as is proposed in this case, will at least, in times of scarcity during the hot summer months, and especially during the periods of protracted drouths, which have become so common of late years in this State, be benefitted thereby besides receiving the market value of the land condemned.

In view of the physical and climatic conditions in this *this* State and in the light of the history of the arid West which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insur-
32 mountable barriers in the way of the future welfare and prosperity of the State, would be giving to the term "Public use" altogether too strict and narrow an interpretation and one we do not think is contemplated by the Constitution. The foregoing conclusions are supported by abundant authority.

10 Am. & Eng. Ency. Law, (2nd ed.) 1064 and cases cited.

In the case of Dayton Mining Co. *v.* Seawell, 11 Nev. 394, the plaintiff sought to condemn a right of way over certain lands to a mining claim owned by plaintiff, to be used for the purpose of transporting wood, lumber, timbers, and other material to enable it to conduct and carry on its business of mining. The claim was made in that case, as it is in this, that the statute under which the action was brought was unconstitutional for the same reasons as are urged in the case before us. Mr. Chief Justice Hawley, speaking for the court, says: "That mining is the paramount interest of the State is not questioned; that anything which tends directly to encourage mineral developments and increase the mineral resources of the State is for the benefit of the public, and is calculated to advance the general welfare and prosperity of the people of this State, is a self-evident proposition. Hence it necessarily follows that if the position contended for by petitioner is correct, and I believe it is, then the act is constitutional and should be upheld. Although other and weaker reasons have been more frequently assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given. * * * Now it happens, or, at
33 least is liable to happen, that individuals by receiving the title to barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation * * * to greatly embarrass if not entirely defeat the business of mining in such localities. In my opinion the mineral wealth of this State ought not to be left undeveloped for any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this State many of the advantages which other States possess; but by way of compensation to the citizens has placed at her doors, the richest and most extensive silver deposits ever yet discovered. The present prosperity of the State is entirely due to the mining developments already made, and the entire people of the State are directly interested in having the future development unobstructed by the obstinate action of any individual or individuals."

In the case of Ouray *v.* Goodwin, 26 Pac. 376, practically the same question was involved as is presented here, and the supreme court of Arizona, in an elaborate and exhaustive opinion in which many cases are cited and reviewed, held that the use of water for irrigation is a public use, and that an act of the Arizona legislature, providing for the condemnation of lands for canal purposes was constitutional.

De Graffenreid *vs.* Savage, 9 Colo. 131.

Yunker *v.* Nichols, 1 Colo. 551.

Schilling *vs.* Rominger, 4 Colo. 100.

In the case of Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, the court in the course of the opinion says: "On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public
34 use, and therefore as a valid exercise of the legislative power. * * * To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the land owner is not therefore a fatal objection to this legislation." In conclusion, the court, on this point, further says: "We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use."

Ellinghouse *v.* Taylor, 19 Mont. 462.

There are many other well considered cases which declare the same general doctrine as those referred to, but we deem it unnecessary, to make further citations.

The judgment of the district court is affirmed. The costs of this appeal to be taxed against the appellants.

I concur:—

BARTCH, J.

I dissent:—

BASKIN, C. J.

35 In the Supreme Court of the United States.

LEE L. CLARK, ROBERT N. BENNETT, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, Defendants and Plaintiffs in Error, vs. E. J. NASH, Plaintiff and Defendant in Error.	Petition for Writ of Error.

And now come Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, the plaintiffs herein, and respectfully show to this honorable court:

1. That on the 29th day of July, 1902, E. J. Nash, the defendant in error, filed in the district court of the fourth judicial district of the State of Utah, in and for Utah county, his complaint, in which he alleged in substance that he was the owner of eighty acres of land in Utah county, which without irrigation was barren but when irrigated would produce abundantly of agricultural crops; that he owned sufficient of the waters of Fort Canyon creek to irrigate said land.

That the defendants, Clark and Bennett, own two quarter sections of land lying north of Nash's land, and between it and the point where all the defendants take out of Fort Canyon creek a ditch which is owned by all the defendants and runs through the lands owned by said Clark and Bennett as above stated, and is used by all the plaintiffs in error for the irrigation of their lands; that said ditch passes near the lands of said Nash, defendant in error; that the said ditch is too small to carry the water of the defendant in error and that of the plaintiffs in error, but that by being enlarged to the extent of one foot in width would be large enough to carry the water of all parties.

That there is no other convenient or practicable way in which to divert the waters of said creek onto the lands of the defendant in error except by and through the ditch of the plaintiffs in error above described, and that in order that he may enjoy the use and benefits of said water it is necessary that he have a right of way through the said ditch.

That if he is permitted by a decree of the court to use said
36 ditch, his land can be made productive and the said water to which he is entitled "will be put to beneficial and public use, in the irrigation of plaintiff's said land, and for no other purpose."

He then prays that he be permitted to enlarge said ditch to the extent of widening it one foot; that he have a perpetual right of way through said ditch when so widened for the purpose of carrying his said water for irrigation purposes; that the court assess the damages done to the owners; that his rights in and to the use of said ditch be condemned for such purpose, and that the owners be enjoined from in any manner asserting any right antagonistic to such right so decreed to him.

2. To this complaint the defendants filed a general demurrer on the ground that said complaint did not state facts sufficient to constitute a cause of action against them.

3. The trial court overruled the demurrer, and the defendants electing to stand thereon, the court heard proof and rendered a decree in favor of the plaintiff as prayed for in his complaint.

4. From that judgment the defendants appealed to the supreme court of the State of Utah and asked for a reversal of the judgment because:

(*a.*) The judgment takes the private property of the defendants without their consent and gives it to a private person for a merely private use, thereby depriving the defendants of their property without due process of law, in violation of section one of article XIV of amendments to the Constitution of the United States, which provides as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

(*b.*) The effect of the judgment of the trial court in this case is, to compel the defendants, against their will, to transfer an estate in part of the lands and ditch which they own and hold as their private

property, to a private person for his own exclusive and private benefit without any reference to a public use, the said judgment being in essence and effect, a taking of private property of the defendants without their consent, for the private use of the plaintiff,
37 without due process of law, and in violation of section one of article XIV of amendments to the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

5. The supreme court of the State of Utah overruled the defendants' contention in a judgment rendered by it on the 23rd day of January, A. D., 1904.

Wherefore, these plaintiffs in error pray—

That a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to this the Supreme Court of the United States.

Dated February 5th, 1904.

LEE L. CLARK,
ROBERT N. BENNETT,
T. F. CARLISLE,
LINCOLN CARLISLE,
RICHARD CARLISLE,
Plaintiffs in Error and Petitioners,
By J. W. N. WHITECOTTON,
Their Attorney.

Attorney's address, Provo City, Utah.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you, or some of you, being the highest court of law of the said State in which a decision could be had in the said cause, between E. J. Nash and Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, wherein was drawn in question an authority exercised under said State of Utah on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity; a manifest error hath happened to the great damage of the said Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, as by their complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 4th day of April next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of February, in the year of our Lord, one thousand nine hundred and four.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk United States Circuit Court, District of Utah.

Allowed by—

ROBERT N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

39 UNITED STATES OF AMERICA, ss:

To E. J. Nash, and to Warner, Houtz, Prentiss and Warner, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, wherein Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle are plaintiffs in error and said E. J. Nash is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Robert N. Baskin, chief justice of the supreme court of the State of Utah, this 5th day of February, A. D. 1904.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

ROBERT N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

Attest:

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

The foregoing citation was served upon us by the delivery to us of a copy thereof, this 5th day of February, A. D. 1904.

WARNER, HOUTZ, PRENTISS & WARNER,
Attorneys for E. J. Nash, Defendant in Error.

40 In the Supreme Court of the United States.

In the Matter of the Petition of LEE L. CLARK, ROBERT N. BENNETT, T. F. CARLISLE, LINCOLN CARLISLE, and RICHARD CARLISLE for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Errors.

* * * * * * *

Come now Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, petitioners for a writ of error to the supreme court of the State of Utah, by J. W. N. Whitecotton, their attorney, and say,

That the said supreme court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following respects, to-wit:

The said court erred in affirming the judgment of the trial court and condemning to the use of the plaintiff and in transferring to him for his private use and benefit from the defendants, without their consent and against their objections, an interest in the defendants' ditch and the right to enter upon the lands of the defendants and enlarge the said ditch by making it wider than it had been constructed by them, for the reason, that such transfer and condemnation of defendants' said property is for a merely private use and purpose, to-wit, for the irrigation of plaintiff's eighty acres of land and for no other purpose, and is, in essence and effect, a taking of the private property of the defendants, without their consent, for the private use of the plaintiff, and thereby deprives the defendants of their property without due process of law, in violation of section one of article XIV of amendments to the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law." Which said provision of the Constitution was expressly cited, urged, and relied upon by the defendants in said supreme court of the State of Utah, as a ground of reversal of the judgment of the trial court.

J. W. N. WHITECOTTON,
Attorney for Plaintiffs in Error.

Address, Provo, Utah.

41 In the Supreme Court of the State of Utah.

LEE L. CLARK, ROBERT N. BENNET, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, Defendants and Plaintiffs in Error,
vs.
E. J. NASH, Plaintiff and Defendant in Error.
} Waiver of Undertaking.

Whereas the above-named plaintiffs in error are desirous of suing out a writ of error in this cause from the Supreme Court of the United States to the supreme court of the State of Utah, and

Whereas the defendant in error is confident that the said plaintiffs in error will prosecute said cause to a final determination, and will pay all costs and damages if they fail to make said writ of error good,

Now, therefore, in consideration of the premises, the defendant in error hereby waives the giving of any bond or undertaking by said plaintiffs in error, and this stipulation and waiver shall operate as a supersedeas pending the determination of this cause in the Supreme Court of the United States.

Dated this 5th day of February, A. D. 1904.

E. J. NASH, *Defendant in Error*,
By WARNER, HOUTZ, PRENTISS AND WARNER, *His Attorneys.*

42 UNITED STATES OF AMERICA.

STATE OF UTAH, } ss.:
County of Salt Lake, }

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, do herewith transmit a transcript of the record of proceedings had in this cause wherein Lee Clark, Robert N. Bennet, T. F. Carlisle, Lincoln Carlisle and Richard Carlisle are plaintiffs in error, and E. J. Nash is defendant in error, and the judgment and opinion of said court, together with the original petition for writ of error, writ of error, citation, assignments of error, and the waiver of the undertaking on appeal in said cause.

And I further certify that the said transcript of the proceedings had herein, submission of cause, judgment and opinion, are full true, and correct copies of the several originals thereof now on file or of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court of the State of Utah, this 1st day of March, 1904.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

LILBURN P. PALMER.

Endorsed on cover: File No. 19,284. Utah supreme court. Term No. 218. Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, plaintiffs in error, *vs.* E. J. Nash. Filed March 28", 1904. File No. 19,284.

I.

STATEMENT.

This action was commenced in the Fourth District Court for Utah County, in the State of Utah, in June, 1902, by the plaintiff filing his complaint, in which he alleges that he owned eighty acres of land in Utah County, which land was barren and sterile without artificial irrigation; that with irrigation it would be productive of agricultural crops; that Fort Canyon Creek is a natural stream of water in Utah County; that the defendants owned the two quarter sections of land lying north of his land, and that they also owned a water ditch located upon and across their lands, through which they conducted water for the irrigation of their lands; that the plaintiff owned a portion of the waters of said Creek sufficient to irrigate his land; that there was no other convenient or practicable way in which to divert his water from the creek onto his land than by and through the ditch of the defendants; that to irrigate his land, it is necessary that he have a right of way through defendants' ditch.

In the 11th paragraph of his complaint plaintiff alleges, that if plaintiff is permitted by decree of this Court to use the same his land can be made productive, and the use of said waters to which plaintiff is entitled can and will be put to beneficial and public use in the irrigation of plaintiff's said land, and for no other purpose.

Upon this complaint, plaintiff asked to be permitted by the Court to enter upon defendants' land and enlarge their ditch by making it one foot wider; that he have a perpetual right of way through said ditch when so enlarged for the purpose of diverting and carrying his said water to his land for irrigation purposes; that he have his rights in and to said ditch established by condemnation, and that the defendants be enjoined from in any manner asserting any right antagonistic to such right of the plaintiff.

To this complaint the defendants interposed a general demurrer, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants elected to stand thereon, and the plaintiff had judgment according to the prayer of his complaint.

From the judgment of the district court, the defendants appealed to the Supreme Court of the State of Utah, which affirmed the judgment.

In the Supreme Court of the State, the defendants contended that the judgment of the trial court was in essence and effect, taking the private property of the defendants without their consent, and giving it to the plaintiff for his sole private use, and that thereby the defendants were deprived of their property without due process of law, in violation of Section One of Article XIV of Amendments to the Constitution of the United States, which provides

"Nor shall any state deprive any person of life, liberty or property without due process of law."

Notwithstanding this contention by the defendants, the Supreme Court of Utah, on January 23rd, 1904, affirmed the judgment of the trial Court.

To review this judgment of the Supreme Court of Utah, the cause has been brought here by Writ of Error.

II.

ERRORS ASSIGNED.

The Supreme Court of the State of Utah erred in affirming the judgment of the trial court, and condemning to the use of the plaintiff, and in transferring to him for his private use and benefit from the defendants, without their consent and against their objections, an interest in the defendants' ditch, and the right to enter upon the lands of the defendants and enlarge the said ditch, by making it wider than it had been constructed by them, for the reason that such transfer and condemnation of defendants' said property is for a merely private use and purpose, to-wit: the irrigation of plaintiff's eighty acres of land, and for no other purpose, and is in essence and effect a taking of the private property of the defendants without their consent for the private use of the plaintiff, and thereby deprives the defendants of their property without due process of law, in violation of Section One of Article XIV of Amendments to the Constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty or property without due process of law." Which said provision of the Constitution of the

United States was expressly cited, urged and relied upon by the defendants in said Supreme Court of the State of Utah as a ground of reversal of the judgment of the trial court.

III.

ARGUMENT.

The sole question presented in this case is, was the taking of the property of the plaintiffs in error and transferring it to the defendant in error for a public use. There is no pretense either in the pleadings nor in the judgment of the Courts below, that the property condemned was to be used by any other person than the defendant in error. In paragraph 11 of his complaint, found on page 3 of the printed record, we find the following language: "That if plaintiff is permitted by decree of this Court to use the same, that his land can be made productive as aforesaid, and the use of said waters to which plaintiff is entitled can and will be put to a beneficial and public use in the irrigation of plaintiff's said land and for no other purpose." How this sole use of the property condemned by this defendant in error is converted from a private to a public use by merely calling it public, does not seem to be satisfactorily explained, and it is respectfully submitted that the nature of a use can not be changed from private to public by mere words. It has been contended in this case that irrigation is a public purpose. That *public* irrigation might lawfully be declared to be a public purpose, is not disputed; but that irrigation by a single individual for his private and sole benefit, we think never has been at all, and never can be *lawfully*

made a public use. If the irrigation of plaintiff's land under the circumstances set forth in this record be a public use, what would be a private use?

Dealing with this subject Lewis on Eminent Domain, Section 158 (1st Edition) uses the following language: "It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one. But this determination is not final. All the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary. Some *dicta* have been understood as announcing the doctrine that it was competent for a legislature not only to decide upon the necessity and expediency of the exercise of the power of eminent domain, but also to determine absolutely what uses are public within the meaning of the constitution. We think it more likely that these *dicta* have been misapprehended than that any judge ever intended to announce such a doctrine and the *dicta* usually referred to do not necessitate any such construction."

Taking private property for right of way for railroads is one of the commonest occurrences under the right of eminent domain, and is universally conceded to be lawful when the railroad is to become a public utility for the accommodation of all comers who offer to pay for accommodations; in other words, a public railroad. This general rule, however, would not authorize the condemnation of private property for a right of way for a railroad to be constructed and operated by one man for his sole use and benefit.

We submit that the same infirmity attaches to the claim of the plaintiff in this case.

The right of municipalities to condemn private property when necessary for supplying their inhabitants with water for irrigation or other useful purposes, is not denied. In California, under a constitutional provision therefor ,the Supreme Court has upheld the condemnation of private property for a right of way for canals to be operated by irrigation districts, which the constitution expressly declares to be public corporations.

In the case of Taylor vs. Porter, 4 Hill 140, the Supreme Court of New York went into a very full discussion of the fundamental principles involved in an attempt to condemn private property for a private way under a legislative enactment. The act was held unconstitutional and void, in an opinion which contains the following, beginning at the last paragraph of page 143: "The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A can without his fault, be transferred to B, it may as well be done without as with consideration. This view of the question is sufficient to put us upon the inquiry, where can the power be found to pass such a law as that under which the defendants attempt to justify their entry upon the plaintiff's land? It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble

magistrate in the state who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature to take the property of A and give it to B,either with or without compensation. Only one clause of the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that the legislative power of this state shall be vested in a senate and assembly. It is readily admitted that the two houses, subject only to the qualified negative power of the governor, possesses all the legislative power of the state; but the question immediately presents itself, what is that legislative power, and how far does it extend? Does it reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In Wilkinson vs. Leland, (2 Peters, 667), Mr. Justice Story says: 'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property shall be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under a general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention.'

"He added: 'We know of no case in which a legistative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in

the Union. On the contrary ,it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.' The security of life, liberty and property lies at the foundation of the social compact, and to say that this grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A, either with or without, compensation, and give it to B. The legislative power of this state does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power." And the entire opinion is replete with learning upon the subject.

The Court of Appeals of New York had occasion to sound a note of warning against this monstrous doctrine in the matter of E. B. W. & M. Co., 96 N. Y., 42, where the Eureka Basin Warehouse Company sought to condemn private property for the purpose of erecting its buildings and other works, under authority of a statute of the state, and held the statute unconstitutional and void. At page 48, the court expresses its views as follows: "We cannot regard such a project as a public purpose or use which justifies the delegation to the company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public

purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure to be built thereon, will tend incidentally to benefit the public by affording additional acommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use, or to direct their management is conferred upon the public."

The last expression by the Court of Appeals of New York upon this subject, so far as I am advised is in the case of

Re Tuthill, reported in 163 N. Y., 133.

The decision in that case involved the question of the validity of an amendment to the State Constitution, when tested by that provision in the Fourteenth Amendment to the Federal Constitution, which declares that no State shall deprive any person of life, liberty, or property, without due process of law.

It was a proceeding instituted by the petitioners for the purpose of causing certain low and wet lands in the County of Orange, in the State of New York, of which they were owners, to be drained through ditches to be constructed over the lands of others; and the warrant for its commencement, and for the various steps taken, was claimed to be found in chapter 384 of the laws of 1895. The act provided in its first section, that "A person owning agricultural lands within this state may institute proceed-

ings for the drainage of such lands or the protection thereof from overflow, by the construction and maintenance of a drain or dyke, on lands of another person, or the use of mechanical devices, by presenting a verified petition to the County Court of the County," etc. The persons whose property was sought to be taken, resisted and took the matter into court. The opinion of the court is lengthy and full of learning. It holds that the drainage of agricultural lands by necessary drains, ditches and dykes, upon lands of others, under proper restrictions, and upon just compensation, for which provision may be made by general laws under the Amendment to the Constitution, Article One, Section Seven, adopted in 1894, is a taking of private property for a private use, in violation of the United States Constitution, Fourteenth Amendment, prohibiting a state from depriving any person of his property without due process of law. The note in this case, published in 49 L. R. A., 781, is full and reviews the authorities at great length.

Another case which fully reviews the elementary principles involved here is that of

Nesbitt vs. Trumbo, 39 Illinois, 110,

Where it is held that "The act of 1861, which authorizes the establishment of private ways over land, against the objections of the owners thereof, violates Article 13, Section 8, of the Constitution of the State, which provides that no person shall be disseized of his freehold or deprived of his property but by the judgment of his peers or the law of the land. The right to private property is under the protection of the Constitution, and is sacred and inviolable, and the legislature cannot take or invade it, for any mere private purpose, or transfer it from one person to another against the will of the owner,

whether indemnity be provided or not.

"Accordingly, the legislature is powerless to afford the means by which a person can procure the right of way over another person's land without his consent. His right is supreme except where the property is needed for public use, and he must be compensated before it can be taken."

In the case of

Sholl vs. German Coal Comany, 118 Ills., 427,

The Supreme Court of Illinois again took occasion to review the principles upon which public or private use is to be determined, and said, beginning at page 431: "Most of the general principles constituting the law of eminent domain are well settled. The right to take private property for public use is generally conceded to be an attribute of sovereignty, and being such, it is not within the power of the state, by legislative grant, or otherwise, to surrender or barter it away. Being inherent, it exists independently of written constitutions or statutory laws; yet, in free governments like our own, where private rights are secured by wholesome laws and constitutional restrictions, the power to take private property for the common welfare remains dormant until the terms and conditions upon which it is to be exercised have been prescribed by appropriate legislation. The power or right in question, is by some referred to the feudal theory of tenure—by others to the implied compact theory; but the better opinion, perhaps is, that it is founded upon public utility and necessity. The exercise of power is a strictly legislative function, and, subject to the right of the courts to determine whether the use for which the property proposed to be taken is a public one, and whether the condemnation proceedings have been conducted ac-

cording to law, the legislature is made the exclusive judge of the necessity or emergency justifying the exercise of the power. So far there is little or no contrariety of opinion. The chief difficulty, and the one which has led to an irreconcilable conflict, in the cases, is, to discover some satisfactory test by which a public use may, in all kinds of cases, be distinguished from private ones. Such is the difficulty here. The parties in this case are agreed, that if the use for which the property sought to be taken is a private one, there is no power or authority, under the constitution, to take it, and that, consequently, the order of the court below was without authority of law, and void. But on the other hand, if the use, under the facts disclosed, is a public one, it is clear the court below had power and jurisdiction to make the order, however many errors may have intervened in the proceedings.

"The question, then, whether the use in the present case is a private or public one, is not only directly presented, but it is of controlling influence in the event it should be determined against the petitioner, for whatever our views might be on the other questions discussed by counsel the judgment below would have to be reversed. As before stated, the decided cases furnish no universal test by which it may be described or defined, and the attempts to do so have resulted in more or less conflict.

"Without attempting to define a public use, or to give such a test, a few general observations on the subject may not be inappropriate. The expression public use, *ex vi termini*, implies an interest or right of some kind in the public, and as the public can have no existence separate and apart from the people, of which it consists, it follows, that the interest or right, whatever it is, belongs to and is

vested in the people. This being so, it is the duty of the state to see that it is properly protected. Without attempting, as we might, if the question were an original one, to determine the nature or extent of this right or interest, we have no hesitancy in saying that if the use is a continuing one, as it is in all cases where property is taken for the purposes of a public ferry, railroad or the like, the right or interest of the public is co-extensive with the use to which it is annexed, and that it is not within the power of those exercising the franchise to deprive the people of the benefits resulting therefrom. Persons or corporations condemning property for such purposes, assume certain obligations and duties to the public, which they cannot disregard, without forfeiting their franchises, and otherwise rendering themselves liable. In all such cases, the character of the business proposed to be done, and the manner of doing it, must be looked to in determining whether the use will be a public or a private one. If, from the nature of the business and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true, that benefits resulting from a public use, capable of individual appropriation, are open to all alike, upon the same terms and conditions.

"Viewing the question before us in the light of the general principles here stated, it is clear, the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works, and the present tramway are, in the strictest sense, private property, and the public, generally, have no more interest in them or in the operation of the works, in-

cluding the tramway, than they have in any other strictly private business. The same would be equaly ly true after the proposed extension of the tramway. The extending of it to the railroad would not change its character, or the obligations of the company to the public, in the slightest degree. Without the consent of the owners of it there is not a person in the state, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight. Indeed nothing of the kind is contemplated or intended. It is manifest the company now has, and after such extension of its tracks would still have the right to use it for its own private business, exclusively. It could run it or cease to use it altogether, without violating any right in the public or any duty which it owes to the people. Clearly this could not be so if the use were public in the sense of the constitution."

Suppose the plaintiff in this case, having obtained by a judgment of the court, a right to enter upon the defendants' land and widen their ditch from 18 to 30 inches, so enters and widens it, and then for some reason concludes not to put any water in it. The ditch as constructed at present is just adapted to the needs of the defendants, and when made a foot wider, unless a corresponding flow of water is turned into it and kept there, will be too wide for the depth and will inevitably waste the defendants' water. Who will have any interest in the affair? Will the County, or District Attorney have any authority to move in the premises in the interest of the public and as a public measure, compel him to use this "public" utility with which the court has invested him? And yet it is the duty of one or the other of these officers to look after public interests and see

to it that they are not allowed to suffer. Would the public have any interest whatever in such a controversy? Certainly not. It would devolve upon the defendents at their own proper charges to get such relief as is given to private litigants.

Suppose again, the plaintiff, after acquiring the right to usurp the defendants' property, concludes to sell his water to some one who lives above him, and above the point where he now proposes to divert it from the creek. Has he not a right to do so? Is not the water strictly his own private property? Can any one dictate to him how he shall dispose of it? Would he not resent any interference with his rights so acquired in this ditch on the ground that the property is his, and that he can do with it as he will? And still we find him here in a court of justice asking, and so far obtaining, the right to dispose of the defendants' property after they tell him they will not sell it to him. If one man is the public, what is the meaning of private? If community of interest is necessary to public interest, where do we get the community in this case?

It has been claimed in this case that irrigation is a public enterprise, and it is if it be *public* irrigation. That same claim was made for this same kind of an attempt in the case of

Lorenz vs. Jacob, 63 Cal., 73, and the Court held that irrigation and the added interests of private mining enterprise, did not make it so, and added: "It clearly appears from the evidence that the main and substantial object of plaintiffs is to use the water in working their mining claims. That private property cannot be taken for such a purpose."

The Supreme Court of California had occasion to state some of the characteristics of public and pri-

vate use in respect to the exercises of the right of eminent domain, in the case of

Lindsay Irrigation Company vs. Mehrtens, 97 Cal., 680, where they use the folowing language: "The term 'farming neighborhood' is an indefinite expression and whether it can be applied to any particular tract of land must be determined by evidence. The word 'neighborhood' is not synonymous with territory or district, but it is a collective noun with the suggestion of proximity, and refers to the units which make up its whole, as well as the region which comprehends those units. One of the definitions given in the Century Dictionary is 'A district or locality especially when considered with relation to its inhabitants or their interests.' A farming neighborhood may be defined as a region in which there are several tracts of farming land with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors, and while a tract of land, though large in extent, might if held in different proprietorships, constitute a neighborhood, yet it would not if held in single ownership.

"The term 'public use' is also an expression of indefinite significance, and its application to the facts of any particular case is also to be determined from evidence. The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a public use, yet the same tract of land might be so sub-divided

and held in individual proprietorship as to render the supply of water to it a public instead of a private use. The same tract of land may constitute a farming neighborhood, and yet be so limited in the elements which make it a neighborhood, that the supplying of water to it would not constitute a public use. It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use."

The case of Fallsburg Power & Manufacturing Co., vs. Alexander et al, from the Supreme Court of Virginia, reported in 61 L. R. A., 129, contains a learned discussion of this question, and holds along the same general lines as the cases above cited.

In the case of Gayland vs. Sanitary District of Chicago, 204 Illinois, 576, the Court held that the legislature cannot authorize the condemnation of private property for the erection of public mills and machinery generally, without anything to show what is meant by a public mill, or anything to give the public any interest in the mill after it is erected.

In the case of Healy Lumber Co., vs. Shamgar Morris and Wife, 63, L. R. A., 820, the Supreme Court of Washington held: "The acquisition of an easement over land for the transportation to market of logs of a private owner is within the constitutional provision that private property shall not be taken for private use, and making the question whether or not a contemplated use is private one for the determination of the courts.

"That a particular use will be of benefit to the public, does not alone make it a public use within the meaning of the constitutional provision, that

private property shall be taken only for public use.

"A constitutional authority to acquire an easement over land for a private use or necessity does not empower one land owner to condemn a right of way over his neighbor's property for the purpose of getting his logs and timbers to market." This case contains a very full discussion of the general doctrine under consideration.

The plaintiffs in error believe that the question here presented was substantially decided by this Court in the case of

The Missouri Pacific Railway Co., vs. Nebraska, 164 U. S., 403. In that case, by authority of a state statute, a number of farmers sought to compel the railway company to permit them to erect upon the railway's right of way an elevator in which to store their grain. Their contention was upheld by the Supreme Court of the State of Nebraska, but upon a review by this Court ,at page 416, the following language was used: "The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way.

The order in question was not, and was not claimed to be, either in the opinion of the Court below, or in the argument for the defendant in error, in this Court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit. They do not appear to have been incorporated by the state for any public purpose whatever; or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own applica-

tion to the railroad company, as recited in their complaint to the board of transportation, was only 'for a location, or a right of way at Elwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms.'

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property, and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

"This Court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion, that the order in question, so far as it required the railroad company to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of

the Fourteenth Article of Amendment to the Constitution of the United States."

It is true that in this case it has been contended in argument, and in the pleadings, and in the decisions of both courts below has been found, that the irrigation of the plaintiff's land is a public use, but we submit that such finding is erroneous, is in opposition to every adjudged sense of public use, and is a mere cheap brand to put upon a private use that it may under a false pretense pass as public; that there is no foundation in law or in common sense for saying that the use proposed to be made by the defendant in error of the property taken from the plaintiffs in error is public. We submit that it is the extreme of private use, limited, as it is, to the sole benefit of one person, who does not even propose to share his use with anybody.

The only mention of water rights in the Constitution of the State of Utah is Article 17, thereof, which says: "All existing rights to the use of any of the waters in this state for any useful or beneficial purpose are hereby recognized and affirmed."

The provisions of the statutes under which the plaintiff claims the right to maintain his action are as follows, to-wit:

Section 3588 of the Revised Statutes of Utah, 1898 provides: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

"5. Reservoirs, dams, water gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines and mills, smelters, or other works for the reduction of ores with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.

"6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings.

"10. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

Section 1277 of the Revised Statutes of 1898 is as follows: "Any person or corporation shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels or other means of securing, storing, and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use."

Section 1278 provides: "When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through which a new canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge

said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; *Provided*, That said enlargement is to be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

In passing upon these various provisions, the Supreme Court of Utah has construed them to mean that irrigation by one person under the circumstances appearing in the record of this case is a public use. According to that construction, a private railway, used by its owner only, the floating of logs and lumber by a single individual, the piping of water for running a single farmer's corn sheller or feed mill, used for preparing feed for his own stock only, could as consistently be declared to be a public use.

"Public" is defined in Anderson's Law Dictionary as follows: "Belonging to, concerning, of interest or importance to, affecting the people or community at large; for the accommodation or benefit of all persons."

Webster defines this term as follows: (1) Of, or pertaining to, the people; belonging to the people; relating to, or affecting, a nation, state, or community. (3) Open to common or general use; as, a *public* road; a *public* house; the *public* street."

The Standard Dictionary defines it as follows: "(1) Of, pertaining to, or affecting the people at large, or the community; distinguished from private or personal; as, the *public* welfare or safety; a *public* nuisance; *public* funds or lands; *public* acts; (2) open for the use, enjoyment, or participation of all, either free or on payment of a fee; maintained by or for the public; as, *public* streets or parks."

Anderson in his Law Dictionary defines "private" as follows: "Affecting or belonging to a single person or persons, as distinguished from the people at large; opposed to public or state."

Webster defines private as follows: "(1) Belonging to, or concerning, an individual person, company or interest; peculiar to ones self; unconnected with others; personal; one's own; not public; not general; separate; as, a man's private opinion; private property; and private purse; private expenses or interests."

The Standard Dictionary defines private as follows: (4) "Not common or general; belonging only to one or to a few individuals; special."

Measured by these definitions, it is difficult to see how the use of water by one person for his sole benefit, without any responsibility to or control by the public, can be other than a private use. No branch of the state government says to this man, you shall make use of this "public" utility, nor a word as to the manner of that use.

After spoiling the defendants' ditch, by spreading it out, by cutting away their soil and trespassing upon their premises for the purpose of so doing, for any reason sufficient to satisfy himself only, or for no reason, he may decline to put any water into the said ditch. He may dispose of the water to be taken above the point of diversion, without in any manner becoming responsible to the state or any subdivision thereof, and even without being liable to account to the defendants for the destruction of their property beyond the bare pittance he is ordered to pay for entrance into their ditch and upon their lands in the first instance, even though the defendants may be irreparably injured by the destruction of their ditch for the purposes for which they made

it. It is a matter of no public concern, a matter in which the public has no interest, but is a mere *private* injury which the plaintiff might well justify by pleading the judgment of the court in this case. In addition to dispoiling the defendants of their property and giving to the plaintiff a perpetual right to tresspass upon their land, it fastens upon them as well a joint interest with a stranger, no matter how objectionable personally he may be to them. Instead of taking their property from them and compensating them for it, as is ordinarily done in cases of condemnation under the right of eminent domain, there is but a tenancy in common conferred upon the plaintiff, an unwilling partnership forced upon the defendants, which we submit in all candor is without authority of law and without the sanction of any principle of reason.

The Constitution of the State of Utah, Article One, Section 22, reads as follows: "Private property shall not be taken or damaged for public use without just compensation."

We think it is conceded throughout this case, that this constitutional provision means that private property cannot be taken against the will of the owner for a private use under any circumstances. So that the only question to be determined is, is the use for which this condemnation is allowed a public use within the meaning of the Fourteenth Amendment to the Constitution of the United States. In support of our contention that it is not a public use, in addition to the authorities already cited, we respectfully invite the Court's attention to the following decisions:

Bankhead vs. Brown, 25 Iowa, 540.
Matter of Albany Street, 11 Wendell, 151.

Concord Railroad Co., vs. Greeley, 17 New Hampshire, 47, 55.

Bloodgood vs. Mohawk & Hudson River Ry. Co., 18 Wendell, 9.

Beekman vs. Railway Co., 3 Paige, 73.

Witham vs. Osborn, 4 Oregon, 318.

Helburn's Case, 3 Bland (Md.) 95.

Hoy vs. Swan's Lessee, 5 Md., 237, 244.

Dunn vs. Charleston, Harper (S. C.) 189.

Osborn vs. Hart, 24 Wis., 89.

Tyler vs. Beacher, 44 Vt., 648.

Dickey vs. Tennison, 27 Mo., 373.

Clark vs. White, 2 Swan, 540.

Sadley vs. Langham, 34 Ala., 311.

Valley City Salt Co., vs. Brown, 7 W. Va., 191.

New Central Coal Co., vs. George's Creek Coal & Iron Co., 37 Md., 537.

Varner vs. Martin, 21 W. Va., 534.

Bangor Railroad Co., vs. McComb, 60 Me., 290.

McChandless' Appeal, 70 Pa. St., 210.

Embury vs. Connor, 3, N. Y., 511.

Scudder vs. Trenton Deleware Falls Co., 1 N. J. Eq., 694, 726.

Robinson vs. Swope, 12 Bush (Ky.) 21, 27.

Harding vs. Funk, 8, Kansas, 315, 323.

Jenal vs. Green Island Draining Co., 12 Neb., 163.

Waddell's Appeal, 84 Pa. St., 90.

Brown vs. Beatty, 34 Miss., 227, 240.

Hand Gold Mining Co., vs. Parket, 59 Ga., 419, 421.

McQuilton vs. Hallon, 42 Ohio St., 202.

Upon these authorities we respectfully submit that the Judgment of the Supreme Court of Utah is in violation of the rights of the plaintiffs in error as guaranteed by the Fourteenth Amendment, and is therefore erroneous and ought to be reversed.

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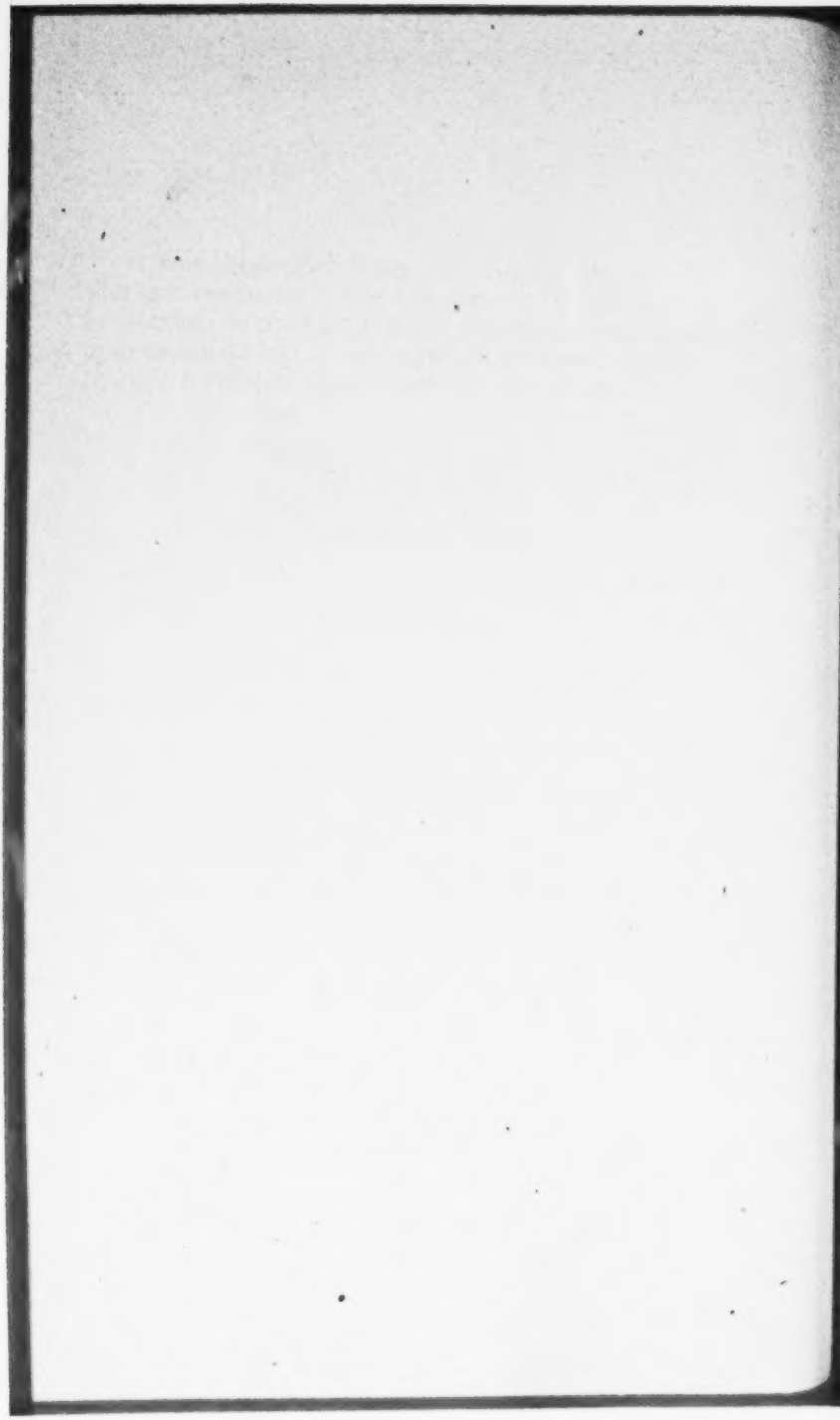

Supreme Court of the United States.

No. 218.—October Term, 1904.

Lee L. Clark, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, Plaintiffs in Error,
vs.
E. J. Nash.

In error to the Supreme Court of the State of Utah.

[May 15, 1905.]

This action was brought by the defendant in error Nash, to condemn a right of way, so called, by enlarging a ditch for the conveying of water across the land of plaintiffs in error, for the purpose of bringing water from Fort Canyon Creek, in the county and State of Utah, which is a stream of water flowing from the mountains near to the land of the defendant in error, and thus to irrigate his land.

The plaintiffs in error demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against them. The demurrer was overruled, and the defendants then waived all time in which to answer the complaint and elected to stand on the demurrer. Thereafter there was a default entered against the defendants, and each of them, for failing to answer, and the case was under the practice in Utah then tried and evidence heard on the complaint of the plaintiff, showing the material facts as stated in the complaint. The trial court found the facts as follows:

"That the plaintiff during all the times mentioned in said complaint, to wit, from the first day of January, 1902, down to the present time inclusive, was, has been and now is the owner of, in possession of and entitled to the possession of the south half of the northwest quarter of section 24, in township 4 south of range 1, east of Salt Lake meridian, in Utah County, State of Utah.

"That Fort Canyon Creek is a natural stream of water flowing from the monutains on the north of plaintiff's said land, in a southerly direction to and near to plaintiff's said land.

"That said land of plaintiff above described is arid land and will not produce without artificial irrigation, but that with artificial irrigation the same will produce abundantly of grain, vegetables, fruits and hay.

"That the defendants own land lying north of and adjacent to plaintiff's said land, and said defendants have constructed and are maintaining and jointly own a water ditch which diverts a portion of the said waters of the said Fort Canyon Creek on the west side of said creek (being the side on which the plaintiff's said land is situated) at a point about one mile north of plaintiff's said land in section 13 of said township, down to a

point within a hundred feet of plaintiff's said land, which said ditch is begun on the defendant' land and runs in a southerly direction over said defendants' land and onto and over the lands of the said defendants to said point about a hundred feet of plaintiff's said land.

"The plaintiff is the owner of and entitled to the use of sufficient of the remainder of the flow of the waters of the said Fort Canyon Creek to irrigate his said land, and that the irrigation of said land by the waters of said creek and the uses of the said waters in the irrigation of the said lands of the defendant is under the laws of this State declared to be, and the same is a public use.

"That the said waters of said Fort Canyon Creek cannot be brought upon the said plaintiff's said land by any other route except by and through the ditch of the defendants, owing to the canyon through which said ditch runs being such as to only be possible to build one ditch.

"That plaintiff has no other way of irrigating his said land except by the use of the waters of said Fort Canyon Creek and that unless plaintiff is allowed to enlarge the ditch of the defendants and have a right of way through said ditch for the flow of the waters of said Fort Canyon Creek, down to the plaintiff's said land, that said land of plaintiff will be valueless and the waters of said Fort Canyon Caeek will not be available for any useful purpose.

"That said ditch of defendants is a small ditch about 18 inches wide and about 12 inches deep; that if the plaintiff is permitted to widen said ditch one foot more it will be sufficient in dimensions to carry plaintiff's said water to which he is entitled to his said land and the same can and will be put to a beneficial and public use, in the irrigation of the soil on plaintiff's said land hereinbefore described.

"That on the 16th day of January, 1902, and while the said defendants were not in the actual use of their said ditch, and while the widening of said ditch at said time would not in any manner interfere with said defendants, other than the act of widening of same, the plaintiff requested of the said defendants the right to so widen the said ditch of the said defendants so to make it one foot wider, for the purpose of using the same to carry the water of the plaintiff on to his said land from said creek, and at said time and place offered to pay to said defendants all damages which the said defendants might suffer by reason of said enlargement, and offered to pay his proportion of the maintenance of keeping the same in repair, and asked of said defendants a right to continue the use of said ditch in common with said defendants, and to use the same so as not to interfere with the use of said ditch by said defendants, and it further appearing to the court that the said plaintiff is now and has ever since been willing to pay said damage and all damage incident thereto—and to pay his just proportion of the cost of maintaining said ditch. That the said defendants then and there and ever since have refused to permit plaintiff to enlarge said ditch or to use the same, or in any manner to interfere with the same.

"And it further appearing to the court that the said defendants would suffer damages by reason of the enlarging of said ditch one foot in width, in the sum of $40.00, and no more. And that the said plaintiff has deposited with the clerk of this court to be paid to the order of the said defendants the sum of $40.00, in full payment of such damages. That the land of the defendants not sought to be condemned by plaintiff would suffer no injury or damage.

"And it further appearing from said evidence that said ditch of the defendants can be widened by the plaintiff one foot more without injury to defendants or to said ditch, and that said widening of said ditch and the use thereof by the plaintiff will not in any manner interfere with the free and full use thereof by the defendants for the carrying of all waters of the said defendants."

Upon these facts the court found the following—

"*Conclusions of Law.*

"The court finds and decides that the plaintiff is entitled to a decree of this court condemning a right of way through defendants' said ditch, to the extent of widening said ditch one foot more than its present width and to a depth of said ditch as now constructed through the entire length thereof down to plaintiff's said land, for the purpose of carrying his said waters of said Fort Canyon Creek to the land of the plaintiff for the purpose of irrigation, and is entitled to an easement therein to the extent of the enlarging of said ditch and for the purposes aforesaid, and to have a perpetual right of way to flow waters therein to the extent of the said enlargement.

"That the defendants are entitled to have and recover from the said plaintiff the sum of $40.00 damages for injury sustained by reason of the enlargement and improvement above stated and such right of way and easement.

"That the plaintiff is required to contribute to the cost and expense of maintaining and keeping the said ditch in repair in an amount and proportion bearing the same relation to the whole amount of cost and expense as the waters he flows therein bears to the whole amount flowed therein both by the plaintiff and defendants.

"That the plaintiff recover no costs herein and judgment is hereby ordered to be entered accordingly."

Judgment having been entered upon these findings, the defendants appealed to the Supreme Court of the State, where, after argument, the judgment was affirmed. (27 Utah, 158.)

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose. They argue that, although the use of water in the State of Utah for the purposes of mining or irrigation or manufacturing may be a public use where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a State statute permitting it.

In some States, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a State statute, we are always, where it can fairly be done, strongly inclined to hold with the State courts, when they uphold a State statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the State courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material, such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land, or of the mines themselves, might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others.

These, and many other facts not necessary to be set forth in detail, but which can easily be imagined, might reasonably be regarded as material upon the question of public use, and whether the use by an individual could be so regarded. With all of these the local courts must be presumed

to be more or less familiar. This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their due weight with the State courts. (*Fallbrook Irrigation Co.* v. *Bradley*, 164 U. S. 112, 159.) It is true that in the Fallbrook case the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a State statute, for the purpose of making reservoirs and digging ditches to supply land owners with the water the company proposed to obtain and save for such purpose. This court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the State statute, which provides, under the circumstances stated in the act for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other land owners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding or that a company should be formed to obtain the water which the individual land owner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law.

The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants

are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated.

We are of opinion, having reference to the above peculiarities which exist in the State of Utah, that the statute permitting the defendant in error, upon the facts appearing in this record, to enlarge the ditch and obtain water for his own land, was within the legislative power of the State, and the judgment of the State court affirming the validity of the statute is therefore

Affirmed.

Mr. Justice HARLAN and Mr. Justice BREWER dissented.

True copy.

Test:

Clerk Supreme Court, U. S.